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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 250

SUN OIL COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

REPLY BRIEF OF PETITIONER SUN OIL COMPANY

JOHN A. WARD, III
1608 Walnut Street
Philadelphia 3, Pennsylvania

CHARLES F. HEIDRICK
EDWIN M. CAGE
J. COLBERT PEURIFOY
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Pursuant to Rule 24(4) of this Honorable Court, Petitioner, Sun Oil Company, submits its reply brief to the brief for the Federal Power Commission (Respondent) in opposition.

PRELIMINARY STATEMENT

This is a companion case to No. 249. In that case Petitioner is seeking review of orders of the Respondent issued March 3, 1961 and March 31, 1961, promulgating rules which declare inoperative and of no effect at law all flexible pricing provisions, except those specifically exempted therein, in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas in interstate commerce, subject to the jurisdiction of the Respondent.

This proceeding involves, in Petitioner's view a specific application of the rules promulgated by the orders sought to be reviewed in Case No. 249, as well as an extension of such rules to contracts executed prior to April 3, 1961, the effective date of the rules. The order sought to be reviewed in the instant case granted Petitioner a temporary certificate of public convenience and necessity to make additional sales pursuant to a contract dated July 10, 1958. Such contract was made applicable to the sale by Petitioner giving unilateral notice to the purchaser on July 3, 1961, of Petitioner's intent to apply production from additional leases to an already existing sale.

The letter order dated September 21, 1961 granting the temporary certificate contained the following statement set forth on pages 4 and 5 of the petition:

> "Further, in the event that any document comprising the listed rate filing was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected" (Appendix A, p. 7a of Pet.; R. 26).

This statement in Petitioner's view not only purports to apply the rules involved in Case No. 249 to a specific sale, but also to broaden and retroactively apply the rules to Petitioner's contract of July 10, 1958, insofar as it is applicable to the sale authorized by the September 21, 1961 letter order.

In the Court below, Respondent contended that the statement was solely of an informative nature and was

not intended to broaden or apply the rules.[1] The Court below agreed with Respondent's interpretation of the statement.[2]

ARGUMENT

In the petition for a writ of certiorari Petitioner set forth reasons why it believes the Court below erred in holding that the statement contained in the order issued September 21, 1961 did not apply or broaden the rules of which review is sought in the companion proceeding, Case No. 249 (Pet. pp. 8-9). These arguments will not be repeated herein. However, as the brief for Respondent calls this Court's attention to Respondent's Order No. 242 (27 F.R. 1356 [Fn. 2, p. 6]) amending its regulations (promulgated by Respondent's March 3, 1961 and March 31, 1961 orders) to provide for the rejection of any tendered contract rate schedule executed after April 2, 1962, containing the proscribed contract provisions, it seems appropriate to emphasize that the March 1961 orders of which Petitioner sought review by an appeal of the September 21, 1961 order contained no provision for rejecting rate schedule filings and only related to contracts executed on or after April 3, 1961 (Pet. p. 5, R. 31). Thus, in Petitioner's view, Respondent has applied, in part, the rejection provisions of Order No. 242 to Petitioner's contract executed on July 10, 1958 as it relates to the sale authorized by the order issued September 21, 1961, both retroactively and even before Order No. 242 was issued on February 8, 1962. Additionally, of course, the statement in the order issued September 21, 1961, under Petitioner's view, broadens the appli-

[1] Pet. to Rev., App. A, p. 5a.

[2] Ibid, p. 5a.

cability of the rules set forth in the March 1961 orders to "any document" whereas the rules only relate to "contracts" executed on or after April 3, 1961.

In the brief for Respondent in opposition (Fn. 2, pp. 6-7) it is stated "* * * that there are two similar cases now pending in the Court of Appeals for the Tenth Circuit which the Commission has moved to dismiss," *Texaco, Inc.* v. *Federal Power Commission*, No. 6947 and *Pan American Petroleum Corp.* v. *Federal Power Commission*, No. 6973. On September 5, 1962, after the Court had heard arguments on the motions to dismiss, the Clerk of the Court advised Respondent's solicitor by letter that the motions to dismiss in these and other cases have been postponed until the cases are heard on the merits.[3] This action by the Tenth Circuit would suggest that that Court has not been convinced that statements similar to (if not identical with) the statement in the order of which review is here sought do not apply the rules promulgated by the March 1961 orders to the temporary certificates involved in those proceedings. The Fifth Circuit dismissed the petition for review in the instant case without a hearing on the merits. Petitioner contends that the statement in the order issued September 21, 1961 not only applies such rules to its sales authorized by such order, but also broadens the rules and applies them retroactively to a contract dated July 10, 1958.

The reliance in the brief in opposition (p. 6) on the Tenth Circuit's decision in *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F. 2d 404, that "* * * the caveat to which petitioner objects did not presently effect its rights * * *" is clearly inappli-

[3] A copy of such letter is included as an appendix to this reply brief, *infra*, p. 8.

cable under Petitioner's view of the effect of the statement in the order issued September 21, 1961.[4] In Case No. 6043 involved in the *Sunray* decision and to which it would seem that the brief relates, the Court held that Respondent's statement in a temporary certificate, in effect, calling attention to Section 7(b) of the Natural Gas Act, was not reviewable, because the Court pointed out that the applicant in that case "* * * is currently selling its gas and has made no affirmative effort to cease * * *" and the "* * * Commission has made no objection to the status quo * * *" (270 F. 2d at 407). However, under Petitioner's view of the effect of the statement in the order issued September 21, 1961 Respondent has declared certain provisions of Petitioner's 1958 contract not even subject to the rules promulgated by the March 3, 1961 and March 31, 1961 orders to be inoperative and no effect at law as such 1958 contract relates to the sale authorized by the order issued September 21, 1961. An order which voids contract provisions, as Petitioner believes the statement in the September 21, 1961 order purports to do, is clearly reviewable under the decisions cited on pages 10-11 of the petition for a writ of certiorari. Moreover, the decision of the Fifth Circuit in *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 157 (1961) clearly holds that an independent producer must seek review of a condition in a certificate, and in Petitioner's view the statement of which review is sought is such a condition, wifhin the time specified in Section 19(b) of the Natural Gas Act from the date the order granting the certificate is issued.[4]

[4] *See also H. L. Hunt* v. *Federal Power Commission*, F. 2d ——— (Nos. 19065, *et al.*, July 19, 1962, petition for rehearing *en banc* pending).

This proceeding involves important legal and other considerations, contrary to the assertion in the brief in opposition (p. 6) that "* * * the case is of no general importance, as the Commission's regulations have subsequently been amended in such a way as to make it unlikely that the issue here presented will be a recurring one * * *." This proceeding, as well as Case No. 249, seeks review of Order No. 232 issued March 3, 1961, as amended by Order No. 232A issued March 31, 1961. Order No. 242 (27 F.R. 1356) to which the above-quoted statement relates makes no changes, as such, in the rules adopted by Order No. 232, as amended by Order No. 232A. Indeed, the validity of Order No. 242 rests upon, and is determined by, the validity of Order No. 232, as amended by Order No. 232A, to which this appeal relates. Hence, the issue with respect to the validity of Order No. 232, as amended by Order No. 232A, is not in any way mooted or otherwise affected by the issuance of Order No. 242. Such latter order only provides for a method of enforcing Order No. 232, as amended by Order No. 232A, after a specific date.

The fact that Order No. 242 changes the machinery for enforcing the rules promulgated in Order No. 232, as amended by Order No. 232A, does not in any way mitigate against the importance to Petitioner and other independent producers of the rights Respondent seeks to destroy by those rules. In the petition for a writ of certiorari in Case No. 249 (pp. 16-18), to which reference was made in the petition in this case, Petitioner showed, it believes, how the limitations imposed by such rules are contrary to the intent of Congress to preserve private contractual arrangements needed to accomplish some of the purposes considered desirable when Congress enacted the Natural Gas Act.

For all the foregoing reasons and the reasons set forth in its petition for a writ of certiorari, Petitioner respectfully prays that its petition be granted.

Respectfully submitted,

JOHN A. WARD, III
1608 Walnut Street
Philadelphia 3, Pennsylvania

CHARLES F. HEIDRICK
EDWIN M. CAGE
J. COLBERT PEURIFOY
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner

By
Omar L. Crook

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas

Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Office of the Clerk

Denver 2, Colorado

September 5, 1962.

6947, 6973, 6975,
6976-6977, 7002,
7018, 7023, 7025,
7026.

Mr. Howard Wahrenbrock, Solicitor,
Federal Power Commission,
441 G Street, N. W.,
Washington 25, D. C.

Dear Sir:

You are advised that the motions to dismiss filed in the following cases have been postponed until the cases are heard on the merits. The record should be certified immediately. The cases are: No. 6947, Texaco, Inc. v. F.P.C., No. 6973, Pan American Petroleum Corporation v. F.P.C., Nos. 6975, 6976, 6977, Pan American Petroleum Corporation v. F.P.C., No. 7002, Pan American Petroleum Corporation v. F.P.C., No. 7018, Sun Oil Company v. Federal Power Commission, Nos.

7023, 7025, 7026, Phillips Petroleum Company v. Federal Power Commission.

Very truly yours,

ROBERT B. CARTWRIGHT
Robert B. Cartwright
Clerk

RBC:nk[illegible]
CC to:

Mr. Alfred C. DeCrane, Jr., Attorney, Texas, Inc., P. O. Box 2332, Houston, Texas

Mr. J. P. Hammond, General Attorney, Pan American Petroleum Corp., Pan American Building, Tulsa 2, Oklahoma

Messrs. Dow, Lohnes and Albertson, 600 Munsey Building, Washington 4, D. C.

Messrs. May Shannon and Morley, 1700 K Street, N. W., Washington 6, D. C.

Mr. John R. Rebman, Legal Department, Phillips Petroleum Company, Bartlesville, Oklahoma